

The opinion in support of the decision being entered today was not written
for publication and is not binding precedent of the Board.

Paper No. 29

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KATY DRIEU

MAILED

Appeal No. 2002-2228
Application No. 09/555,906

JUL 25 2003

ON BRIEF¹

PAT. & T.M. OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

Before WINTERS, WILLIAM F. SMITH and SCHEINER, Administrative Patent Judges.

SCHEINER, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the final rejection of claims 2-8 and 10-13, the only claims remaining in the application.

Claim 11 is representative:

11. A method of alleviating withdrawal symptoms of substance dependency or addiction in a human being comprising administering to said human being in need thereof a Ginkgo biloba extract in an amount sufficient to alleviate said withdrawal symptoms.

¹ We note appellant's "Request for Resetting of Oral Hearing," dated June 25, 2003. Appellant previously requested, and was granted, a rescheduled date (June 24, 2003) for oral hearing. Appellant having been advised that no further rescheduling should be expected, and the date agreed on for the rescheduled hearing having passed, we decline to grant any further requests for rescheduling.

In any case, the Board has determined that a hearing is not necessary. See 37 CFR 1.194(c) (July 1, 2002). There is no disadvantage to appellant thereby, inasmuch as "[a]n appeal decided without an oral hearing [receives] the same consideration by the Board of Patent Appeals and Interferences as appeals decided after oral hearing." 37 CFR 1.194(a) (July 1, 2002).

The references relied on by the examiner are:

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| Park et al. (Park) | 5,541,183 | Jul. 30, 1996 |
| Hsia et al. (Hsia) | 5,976,548 | Nov. 2, 1999 |

Rossi et al (Rossi), "Pharmacological Aspects of Drug Abuse," in Remington's Pharmaceutical Science, Osol et al, eds., Philadelphia Collage of Pharmacy and Science, pp. 1287, 1290-1293, 1295, 1296 (1980)

Kleijnen et al. (Kleijnen), "Ginkgo biloba," The Lancet, Vol. 340, pp. 1136-1139 (1992)

Claims 2-8 and 10-13 stand rejected under 35 U.S.C. § 103 as unpatentable over Hsia, Kleijnen, Rossi and Park.

We find no error in the examiner's determination that the combined disclosures of Hsia, Kleijnen, Rossi and Park are sufficient to establish a prima facie case of obviousness within the meaning of 35 U.S.C. § 103 as to the subject matter of the claims on appeal.

DISCUSSION

Initially we note appellants' statement on page 4 of the Brief that the claims stand or fall together. Therefore, we shall limit our consideration of the issues raised by this appeal as they pertain to independent claim 11. 37 CFR § 1.192(c)(7) (1999).

Claim 11 is directed to administering a Ginkgo biloba extract to a human to alleviate symptoms of withdrawal from substance dependency or addiction. We understand the claim to require administration of a Ginkgo biloba extract to alleviate at least two symptoms of withdrawal from "a substance engendering dependency and/or addiction," which according to the specification, includes "in particular, alcohol, amphetamines, tobacco [and] drugs inducing drug addiction" (page 1).

Kleijnen teaches that standardized extracts of Ginkgo biloba are commonly prescribed to alleviate a host of symptoms including depressive mood, absent mindedness, confusion, anxiety, dizziness and headache (Kleijnen, page 1136). Hsia, referencing Kleijnen, teaches that ginkgo is "known to have an effect on persons suffering from difficulties of concentration and memory, absent mindedness, confusion, and headache" (Hsia, column 4, lines 36-39).

According to Rossi, the symptoms of withdrawal from narcotics include anxiety, depression and confusion, while the symptoms of withdrawal from chronic alcohol abuse include headache, anxiety and confusion (Rossi, page 1290, left-hand column and page 1291, left-hand column).

We agree with the examiner that the teachings of Kleijnen, Hsia and Rossi² are sufficient to establish that "it would have been obvious to one of ordinary skill in the art . . . to use Ginkgo biloba extracts to alleviate the symptoms of withdrawal [described by Rossi] because [the] symptoms are known to be manifested as headache, confusion, etc. and the art [(Kleijnen, Hsia)] clearly teaches that those symptoms can be alleviated by the administration of ginkgo biloba extracts" (Answer, page 5).

We are not persuaded otherwise by the argument that "one skilled in the art would not make the combination that the Examiner has made with [sic, without?] the benefit of [appellant's] teaching" (Brief, page 4) as "[t]here is not one iota of a suggestion of alleviating withdrawal symptoms [with Hsia's nutritional supplements]"

² A discussion of Park, which is directed to methods of preparing particular ginkgolide derivatives, is not necessary to our decision.

(id., page 5), and “[t]here is absolutely no teaching whatsoever [in Rossi or Kleijnen] of any method of treating withdrawal symptoms due to substance abuse by using Ginkgo biloba extracts” (id.). Nor are we persuaded by the argument that there is no “suggestion whatsoever [in Rossi] of Applicant’s conditions being treated . . . [conditions] such as moderate to intense psychopharmacologic effects such as those listed under the marijuana heading and [psychic] excitation, euphoria or high caused by amphetamines³ or intense psychopharmacological dependency due to cocaine addiction” (id., page 6). As stated in In re Herz, 537 F.2d 549, 551, 190 USPQ 461, 463 (CCPA 1976):

It is axiomatic that claims are given their broadest reasonable construction consistent with the specification. In re Saether, 492 F.2d 849, 181 USPQ 36 (CCPA 1974). This complements the statutory requirement for particularity and distinctness (35 USC 112, second paragraph), so that an applicant who has not clearly limited his claims is in a weak position to assert a narrow construction.

Representative claim 11 is not so narrow as appellant makes it out to be. The claim merely requires administration of ginkgo extracts to alleviate “withdrawal symptoms of substance dependency or addiction;” it does not require alleviation of any particular symptoms of withdrawal; nor does it require treatment of withdrawal symptoms associated with any particular substance of dependency or addiction. The art clearly establishes that the symptoms of withdrawal from alcohol and narcotics (both of which are encompassed by the specification’s definition of “a substance engendering dependency and/or addiction”) include headache, anxiety, depression and confusion, and that treatment of each of these symptoms with ginkgo biloba extracts was known.

³ Rossi actually lists these as effects of using marijuana and amphetamines, not withdrawal from them (see page 1293, left-hand column, and page 1294, right-hand column).

In addition, appellant concedes that "there may be certain symptoms of withdrawal that can be found in common with other diseases," but argues that "there is actually no reliable medicine for easing withdrawal symptoms of alcohol or drug dependency while there are other drugs treating such symptoms" (Brief, page 6). If we understand this argument, it is that there are other, known drugs to treat "symptoms of withdrawal that can be found in common with other diseases," but not those symptoms unique to withdrawal. This argument is without merit. Again, claim 11 does not require alleviation of any particular symptoms of withdrawal - it certainly does not require alleviation of symptoms seen only in withdrawal (if indeed there are any such symptoms). Moreover, while there may be many "reliable medicine[s]" for relieving headache, anxiety, depression and confusion (symptoms common to withdrawal and "other diseases"), we fail to see how that would have a bearing on whether one skilled in the art would administer ginkgo biloba extracts to alleviate those symptoms.

On this record, we find that the examiner has provided evidence sufficient to establish a prima facie case of obviousness for claim 11, which appellant has not adequately rebutted. As discussed above, claims 2-8, 10, 12 and 13 stand or fall with claim 11. Accordingly, we affirm the examiner's rejection of claims 2-8 and 10-13 under 35 U.S.C. § 103.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

Sherman D. Winters)
Sherman D. Winters)
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